United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

76-1340

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United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

JAMES D. HANLON, COSTAS NASLAS, and PAUL KATRITSIS,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION FOR REHEARING *EN BANC*

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,	:	
Appellee,	:	DOCKETS NOS. 76-1340 1402
v.	:	1403
JAMES D. HANLON, COSTAS NASLAS, and PAUL KATRITSIS,	:	
Appellants.	:	

PETITION FOR REHEARING
EN BANC

Pursuant to Rule 35, Fed. R. App. P., appellants respectfully petition this Court to reconsider en banc the opinion of affirmance in this case, which, after recall, was filed finally on January 18, 1976. (Slip Op. attached).

The defendants were convicted of fraud after a two-week trial before Honorable Milton J. Pollack, and a jury. The appeal was argued on November 3, 1976. The original opinion of affirmance issued on January 6, 1976. That opinion was recalled, apparently to correct certain factual mistakes, and was reissued on January 18, 1976.

This petition is filed because this case raises an issue of overriding importance to the administration of criminal justice, namely, what is or is not a proper jury instruction on proof of "conscious avoidance"

as establishing actual knowledge of falsity in a criminal fraud case. This instruction, which is also called "the recklessness instruction", has always been recognized as dangerous in that it can serve to dilute and even erase the crucial dividing line between possible civil liability for negligence and criminal liability for knowing fraud. What constitutes a proper and sufficient "conscious avoidance" instruction thus is of obvious and prime importance.

Respectfully, the opinion of affirmance on this question is in conflict with the Ninth Circuit and prior decisions of this Court. The opinion misapprehends the applicable law of "conscious avoidance", seriously misapprehends the complex evidence in this case, and, most strangely, affirms a jury instruction on "conscious avoidance", while, in the very same paragraph, warning district judges never again to give a similar instruction.

What constitutes a proper "conscious avoidance" instruction is a question which must be determined finally in this Circuit, especially in view of the increasing frequency with which it is requested by the government in virtually any case, fraud or otherwise, in which knowledge is an issue. We believe, respectfully, that this Court should hear this case en banc in order to finally determine this question.

I.

The only question in this case was guilty knowledge on the part of the three defendants on trial, as even the original panel recognized (Slip Op. 1451). The instruction on guilty knowledge was therefore central to the determination of guilt or innocence. Judge Pollack, the trial judge, instructed on this issue as follows:

> (1) The second element of this false statement offense under Section 1014 is the subject of knowledge.
>
> (2) The government must establish beyond a reasonable doubt that the defendant whom you are considering knew the statement or report to be false or the security overvalued. Medical science as yet has devised no instrument by which you can go back and determine what purpose was in one's mind when he performed certain acts. Rarely is direct proof available that one had knowledge of a fact or intended to bring about a result. Now and then a person may commit himself in writing or make a statement in which he concedes that as of a certain time he had knowledge of the fact and that he acted with specific intent to achieve a specific result. But of course, that is rare, and is the exception rather than the rule.
>
> (3) The intent with which an act is done is often more clearly and conclusively shown by the act itself or by a series of acts than by words or explanations of the act long after its occurrence. Frequently, the acts of individuals speak their intentions more clearly than do their words.
>
> (4) One may apply the old adage, "Actions speak louder than words."
>
> (5) Accordingly, intent, willfullness and knowledge may be established by surrounding facts and circumstances as of the time acts occurred or events took place and the reasonable inferences to be drawn therefrom. This is referred to as circumstantial evidence and if believed, it is as acceptable as direct evidence.
>
> (6) *Guilty knowledge cannot be established by demonstrating inadvertence, carelessness or other innocent reasons on the part of the defendant.* This applies wherever in this charge reference is made to knowledge and willfulness. *However, it is not necessary that the government prove to a certainty that a defendant whom you are considering knew any given fact or facts.*

(7) *The element of knowledge of a given fact under this false statement or overvalued security charge maybe satisfied by proof that a defendant acted with reckless disregard of what the truth was,* unless he actually believed the contrary to be true. One may not deliberately close his eyes to what otherwise would have been obvious to him.

(8) How does one go about determining whether a defendant knew that a given fact contained on a statement to a bank was false or that the value of certain security such as a vessel was overstated? This is a matter which may be inferred from other facts. Thus, if an individual was involved in loans on the same vessel at two different banks and factual representations were made in connection with the second loan which were inconsistent with representations made in connection with the first loan and the representations made in connection with the second loan were established to have been false, you might infer that such an individual *had knowledge of* the false nature of the second representations *or acted in reckless disregard* of whether such representation was false.

(9) You may infer, if you feel such an inference to be justified, that by not attempting to resolve an inconsistency of this nature, *at the very least* an individual *had acted in reckless disregard* of whether or not a given fact was false.

(10) Similarly, you may infer from a person's involvement with a particular vessel, a particular charter or the particular transaction, that he had knowledge with relation to that vessel, charter, or transaction.

(11) With respect to Costas Naslas and Paul Katritsis, the government contended they had taken part or had knowledge of certain improprieties while employed at Tidal Marine. If you find this to have been the case, when Naslas or Katritsis signed documents which contained these statements of fact you may infer, if you choose, that such misstatements *either were done knowingly and deliberately or* that Naslas and/or Katritsis acted *with reckless disregard or reckless indifference* as to whether such representations were false.

(12) In the case of any particular situation you may ask yourselves did a defendant, because of his prior experience and his knowledge, act in *reckless disregard* of whether or not a given set of facts were false? If you conclude that he did, you may, if you wish, infer that he had knowledge of the false nature of such facts (Emphasis added).

years, with all but four months suspended, to be followed

On original appeal, we argued that the instruction, read as a whole, was erroneous because (a) Judge Pollack's repeated use of the word "reckless" invited a guilty verdict based upon less than actual knowledge, and (b) Judge Pollack's "conscious avoidance" instruction also failed to explain that a finding of actual knowledge based upon "conscious avoidance" could follow only after an initial jury determination that a defendant was "aware of a high probability of falsity" in the first place.

The original panel approved Judge Pollack's "conscious avoidance" instruction despite the absence of the "high probability of falsity" predicate. Its decision is in direct conflict with the en banc determination of the Ninth Circuit in United States v. Jewel, 532 F.2d 697 (9th Cir. 1976), and, we submit, with earlier decisions in this Circuit. See United States v. Brawer, 482 F.2d 117, 128 (2d Cir. 1973), where this Circuit approved another of Judge Pollack's "conscious avoidance" instructions which did contain the "high probability" predicate. See also, United States v. Bernstein, 533 F.2d 775 (2d Cir. 1976). The decision also conflicts with the "conscious avoidance" instruction suggested in §12.02(7) of the American Law Institute Model Penal Code.

In the Jewel case, the Ninth Circuit, sitting en banc, held on this issue:

> "The substantive justification for the rule [conscious avoidance] is that deliberate ignorance and positive knowledge are equally culpable . . . To act "knowingly", therefore, is not necessarily to act only with positive knowledge, but also to act with an awareness of a high probability of the existence of the fact in question."

The Ninth Circuit in Jewel also cited with approval the analysis of this issue by the English authority Professor Glenville Williams, 532 F.2d at 700, N.7:

> "A court can properly find wilfull blindness only where it can almost be said that the defendant actually knew. He suspected the fact; he realized its probability; but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge."

The "high probability" predicate also has been regarded as essential in this Circuit. United States v. Brawer, 482 F.2d 117, 128 (2d Cir. 1972). And an instruction containing the "high probability" predicate was requested by the defense in this case (A. 1929).

The sense of the matter is that a defendant may be found to have engaged in criminal "conscious avoidance", as defined, only if the jury first finds that his suspicions were aroused, or, in the preferred language, that he was "aware of a high probability" of falsity and thereafter deliberately closed his eyes to what was plainly to be seen. United States v. Jewel, 532 F. 2d at 700.

Judge Pollack did not provide this necessary factual predicate in his "conscious avoidance" instruction.

The jury was told simply that "reckless disregard" was sufficient to establish guilt, and was told this six times in six consecutive paragraphs in varying ways. The jury therefore was free to convict for what it might perceive as "reckless" conduct alone, without finding first that there existed the requisite suspicion or "awareness of a high probability of falsity" which, when coupled with evidence of subsequent conscious avoidance, supports a finding of guilty knowledge.

It is no answer that the jury might have found such an awareness - - the necessary factual predicate. It was never given the issue to decide and, most respectfully, an appellant court may not decide what a jury might have found under a proper instruction.

II.

The original panel also erred by issuing a prospective or advisory opinion in a criminal case while denying relief to the defendants actually before the court. See, 1B Moore, Federal Practice ¶0.402 [3.-2-2], at 209.

Of Judge Pollack's persistent and repeated use of the words "reckless", the original panel wrote (Slip Op. 1453-1454):

> We are troubled, however, by the repeated use of the term "recklessness." This Court has previously had occasion to criticize the use of this "technical and confusing" term. United States v. Gentile, supra 530 F.2d at 470; United States v. Bright, supra; see, United

> States v. Sarantos, supra The distinction between recklessness and negligence is illusive enough for even the most respected legal scholars See, Prosser on Torts, 32, 184-86 (4th Ed. 1971). It follows that to the laymen on the jury, it might prove a significant source of confusion. It is thus preferable, in cases such as this, to omit the use of the term. It adds nothing to the "conscious avoidance" language which we have approved, and might tend to mislead the jury. We are satisfied that, in this case the challenged portion of the charge was not error, plain or otherwise. However, should trial courts continue to employ this disfavored language, we will not hesitate to take appropriate corrective measures. Cf. United States v. Robinson, Slip. Op. 445, 451-54 (2d Cir. Nov. 10, 1976). [Emphasis added].*

The original panel emphasized "that, while we have upheld the conviction here, we urge district judges not to use the term 'reckless disregard' in similar cases in the future" (Slip Op. 1452, N.7).

The original panel thus clearly held that use of the "technical and confusing" terms "reckless" or "recklessness" would require reversal in future cases. Yet the panel nonetheless affirmed these convictions, where the only issue was criminal knowledge, and where the now forbidden term was used no less than six times in an instruction which culminated with the admonition that guilt was established "If you find . . . that such misstatements either were done knowingly and deliberately or . . . with reckless

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* The Robinson case reversed on jury instructions.

disregard or reckless indifference as to whether such representations were false."

We submit, respectfully, that a court may not properly or logically prohibit the use of such language and such an instruction in future criminal cases, and, at the same time, deny relief to defendants who were subjected to precisely that language and instruction on the crucial and indeed only issue in their case. Concepts of judicial economy, or even an appellate view of guilt, are insufficient to support such an inequity, especially where the error permeates the central jury instruction.

An appellate court simply cannot determine what twelve jurors might have found given a proper instruction, however the evidence may appear. See, e.g., United States v. Byrd, 352 F.2d 570 (2d Cir. 1965). And that is particularly apparent in this case where the original panel, even after recalling its original opinion, itself made materially and demonstrably incorrect findings of fact.

The opinion of affirmance states that all three defendants concede "their preparation of various false documents." (Slip Op. 1448). There was no such concession. Indeed, there was no evidence that Naslas or Katritsis prepared any documents. The proof was that, with few exceptions, the documents had been prepared by men not on trial, principally in London.

The opinion states that Hanlon "prepared papers in which it was represented that a ship on which a loan was

obtained was purchased for $5.5 million" (Slip Op. 1449). As we are sure even the government would concede, there was absolutely no evidence to this effect. No such papers were ever prepared, much less by Hanlon. The false $5.5 million representation was made orally by Amanatides or Livas in London. Hanlon was not present.

The opinion states that Hanlon, in connection with a six-ship loan, "prepared documentation showing that Scufalos [a false nominee] was the principal" on the loan. Ibid. Again, as even the government would concede, there was absolutely no evidence that Hanlon prepared any such documentation. The document representing Scufalos as the principal was indisputably prepared by Metzger, a bribed bank officer, was an internal bank memorandum, and was neither available to nor seen by Hanlon. Every document Hanlon prepared in connection with this transaction indicated that Tidal Marine was the principal, as it was in fact. No document prepared by Hanlon said or indicated that Scufalos was the principal. No one, including Scufalos and the bank officers, told Hanlon of the sham. Those who testified, including Scufalos, expressly said they had not told Hanlon. The facts therefore were directly contrary to the original panel's understanding.

The opinion states that Naslas was Tidal's "chief operational officer." (Slip Op. 1446-1447). The evidence in fact was that Naslas operated only certain Tidal ships out of New York, and that Tidal's ships "were basically operated out of London" and not by Naslas. (A. 558).

The opinion states that there "was direct testimony that Naslas, like Hanlon, knowingly misrepresented Scufalos as the owner of Tidal's ships in order to obtain loans." (Slip Op. 1450). There was no testimony to this effect.

The opinion's evidentiary findings on Katritsis require both correction and clarification. There was no "testimony that Katritsis knowingly obtained the cash used by Naslas to pay bribes." (Slip Op. 1450). Katritsis was not charged with aiding and abetting any bribery. His only connection was that, on one occasion, he cashed a $20,000 check for Amanatides and returned the cash to Amanatides at or about the time one bribe was paid. There was no evidence--and the government did not claim--that Katritsis knew what the cash was for, much less that it was for bribes.

There was no direct testimony that Katritsis, when asked about the authenticity of a forged document, became "extremely agitated." (Slip Op. 1450). The document in question had been prepared by bank lawyers and was not forged, although the lawyers had backdated it to conform to a loan closing date. The testimony upon which the opinion's finding of "extreme agitation" apparently was based came from the witness George Axiotakis, whom Katritsis, at the lawyers' instructions, asked to sign the document. Axiotakis testified (A. 561):

> "[Q]uite frankly, just jokingly, I said 'Well, it is what it says it is, isn't it?' And Paul said 'Come on George, stop fooling around and sign it.' I signed it and gave it back to him."

The opinion states that Katritsis "knowingly falsified the financial statements of Tidal . . . to obtain a loan" (Slip Op. 1450). For clarification, the alleged incident took place in March 1972, when no Tidal loan application was pending, and after all of the loans charged against Katritsis had closed.

We believe that the evidence of guilt was insufficient on many counts as to these defendants, and on all counts as to Katritsis. Principally, however, we submit that this recitation of error in the opinion's statement and understanding of the evidence establishes the complexity of the evidence in this two-week trial. These evidentiary misunderstandings demonstrate how confusing the evidence must have been to a lay jury, and how great a danger of guilt by association existed. On such a record, any confusion in the instruction on knowledge was prejudicial and cannot fairly be characterized as not error or harmless.

III.

The original panel sustained the knowledge instruction apparently for two reasons. It held, first, that Judge Pollack's conscious avoidance instruction "was entirely proper". Since Judge Pollack's instruction did not mention or require an initial finding of an "awareness of a high probability of falsity", this holding, if accepted, is, as

we have stated, in direct conflict with the Ninth Circuit, with prior decisions in this Circuit, and with the treatment recommended by the American Law Institute.

The original panel held, second, that the possibility of a conviction for less than actual knowledge, i.e., for negligence, was avoided because, in one sentence of his lengthy instruction on knowledge, Judge Pollack, according to the original panel, "was careful to distinguish inadvertence, carelessness or other innocent reasons from his definition of recklessness." (Slip Op. 1453). But, as a reading of his instruction demonstrates, supra, Judge Pollack did not "distinguish" or even compare inadvertence or carelessness from or with "recklessness". Nor did Judge Pollack ever define "recklessness", as the original panel found.

Judge Pollack merely said that inadvertence or carelessness did not establish guilty knowledge. Judge Pollack did not relate carelessness to recklessness, did not define recklessness, and surely did not distinguish one from the other, if indeed a distinction can be verbalized to a lay juror's understanding.* Judge Pollack did not even exclude negligence or gross negligence [different, obviously, from "carelessness"] as a basis for criminal guilt. This omission in itself deprived the jury of even the barest of distinctions from recklessness. See, United States v. Natelli, 527 F.2d 311

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*The original panel itself indicated that a coherent distinction is impossible. It said: "The distinction between recklessness and negligence is illusive enough for even the most respected scholars. . . .It follows that to the laymen on the jury, it might prove a significant source of confusion." (Slip Op. 1454).

(2d Cir. 1975). Finally, after mentioning that inadvertence or carelessness did not constitute actual knowledge, Judge Pollack stated immediately: "However, it is not necessary that the government prove to a certainty that a defendant . . . knew any fact or facts" and then launched into a six paragraph repetition of recklessness as a basis for criminal guilt, ending with the devastating and misleadingly erroneous instruction that guilt was established if misstatements "either were done knowingly or deliberately or . . .with reckless disregard or reckless indifference as to whether such representations were false."

The brief mention of inadvertence or carelessness did little if anything to balance the instruction. It did not mention negligence or gross negligence. It did not compare or distinguish carelessness and recklessness. And recklessness was never defined. The brief mention of inadvertence or carelessness cannot fairly be said to have given justice to these defendants.

IV.

This Court also is respectfully requested to reconsider en banc the original panel's determination of the collateral estoppel issue raised on original appeal. Shevlin, a bank officer, testified that Naslas paid bribes to Shevlin and Metzger, another bank officer. His testimony was identical to testimony he gave at an earlier trial of Metzger. Metzger was acquitted of the very same bribery charges based on Shevlin's testimony. For reasons set forth fully in our

original main brief, pp. 45-48, we submit that the government was collaterally estopped from presenting Shevlin's once rejected testimony in order to convict Naslas. Ashe v. Swenson, 397 U.S. 436 (1970).

The original panel held that the result in Metzger's trial "simply indicates that the jury did not believe, beyond a reasonable doubt, that Naslas bribed Metzger" (Slip Op. 1454). But Shevlin testified at both trials that Naslas bribed Shevlin and Metzger together, at the same time, in the same place, in the same amounts, and for the same reason. His identical once-rejected testimony should have been excluded from Naslas' trial.

CONCLUSION

Rehearing and reargument en banc should be granted. Further briefs should be ordered. The judgments of conviction should be reversed. The mandate should be stayed.

Dated: New York, New York
February 1, 1977

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 408, 409, 410—September Term, 1976.

(Argued November 3, 1976 Decided January 18, 1977.)

Docket Nos. 76-1340, 76-1402, 76-1403, 76-1340

UNITED STATES OF AMERICA,

Appellee,

v.

JAMES D. HANLON, COSTAS NASLAS,
and PAUL KATRITSIS,

Appellants.

Before:

MOORE, FEINBERG and MESKILL,

Circuit Judges.

After a jury trial in the United States District Court for the Southern District of New York, Milton Pollack, *J.*, defendants were convicted of multiple counts of conspiracy, 18 U.S.C. § 371, wire fraud, 18 U.S.C. § 1343, and making false statements to obtain loans from a federally-insured bank, 18 U.S.C. § 1014. On this appeal, defendants allege that the evidence of guilty knowledge was insufficient, that the court's charge to the jury was incorrect, and that testimony offered by the government was barred by collateral estoppel.

Affirmed.

PETER FLEMING, JR., New York, New York (John E. Sprizzo, Douglas K. Mansfield, Curtis, Mallet-Prevost, Colt & Mosle, New York, New York, of counsel), *for Appellants.*

JEFFREY I. GLEKEL, Assistant United States Attorney (Robert B. Fiske, Jr., United States Attorney, Marc Marmaro, Frederick T. Davis, Assistant United States Attorneys, Southern District of New York, of counsel), *for Appellee.*

MESKILL, *Circuit Judge:*

This case grows out of a massive fraud perpetrated upon the National Bank of North America ("NBNA") by Tidal Marine ("Tidal").[1] The scheme was simplicity itself. Tidal was in the business of owning ships, a business universally carried on with borrowed money. The principal security for these borrowings is a mortgage on the ship itself and an assignment of the charters entered into between the shipowner and the shippers who actually operate the boats. By forging the purchase documents and charters for much of its fleet, and through the bribery of lending officers at NBNA, Tidal was able to borrow vast sums of money, approximately thirty million dollars, on the strength of wholly inadequate security. When the scheme finally was revealed, it resulted in the bankruptcy of Tidal, several civil actions for fraud, and this prosecution.

Appellant Hanlon was the attorney who handled most of Tidal's legal matters. Naslas was Vice President of

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1 To a far lesser extent, the same device was used to defraud the London branch of the Bank of America. This fraud was the subject of Counts Two through Seven and Seventeen through Twenty-two of the indictment.

Tidal, and its chief operational officer. Katritsis was the nephew of Harry Amanatides, the founder and President of Tidal, and served as his confidential secretary. Amanatides and three others, Ion Livas, the Chairman of Tidal, Michael Blonsky, who was the manager of Interocean Brokerage, a shell corporation controlled by Livas and Amanatides, and Gregory Spartalis, a lending officer of NBNA, were also indicted for participation in this fraud. However, they all fled the jurisdiction and have never been put to trial.[2]

In 1975, the three appellants were named in a 127-count indictment growing out of this fraud. In addition, Naslas, along with four others not now before the Court, was named in a six-count information.

After a two-week trial in the Southern District of New York, Milton Pollack, *J.*, defendants were convicted by a jury. Hanlon was found guilty of four counts of conspiracy, 18 U.S.C. § 371; three counts of wire fraud, 18 U.S.C. § 1343; and six counts of making false statements in connection with obtaining loans from a federally-insured bank, 18 U.S.C. § 1014. Naslas was convicted of four counts of conspiracy, three counts of making false statements, and one count of aiding and abetting the receipt of a bribe by bank officers, 18 U.S.C. §§ 2, 215. Katritsis was convicted of two counts of conspiracy and five counts of making false statements. Hanlon was sentenced to concurrent terms of five years and two years on various counts. Naslas received concurrent sentences of two years, of which all but six months was suspended, followed by three years probation. Katritsis received concurrent sentences of two

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2 An alleged co-conspirator, Joseph Metzger, an officer of NBNA, was convicted of four counts of willful misapplication of bank funds in a separate trial. Six others connected to the scheme, Mark Scufalos, Nico Cotzias, Stanley Farber, Francis Marone, John Shevlin, and Michael Panayotopulos, pled guilty.

years, with all but four months suspended, to be followed by three years probation.

On this appeal, all three raise various grounds of objection. For the reasons set forth below, we affirm the judgments of conviction on all counts.

I. *Sufficiency of the Evidence.*

All three appellants concede the existence of the fraudulent scheme and their preparation of various false documents. However, all three deny knowing participation and, not surprisingly, claim that they were innocent dupes of the co-conspirators who are presently fugitives. On this appeal, each claims that there was insufficient evidence of guilty knowledge for the case to be sent to the jury. We have concluded that the evidence as to each was more than sufficient. Because of the voluminous record and the number of crimes of which the appellants were convicted, we can no more than briefly indicate the nature of the evidence against each.

A. *Hanlon.*

Hanlon concedes that there was sufficient evidence of guilty knowledge on his part as to seven counts of the indictment, involving fraudulent loans on four ships. Since he received concurrent sentences of five years on these convictions, even were we to find that there was insufficient evidence on the other counts, we would affirm his conviction. *United States* v. *Vasquez*, 468 F.2d 565 (2d Cir. 1975); *United States* v. *Gaines*, 460 F.2d 176 (2d Cir. 1972). In addition, this evidence is probative of guilty knowledge on the other counts as well. We deem it highly unlikely that the chief counsel for Tidal, who spent at least 90 percent of his professional time on that single client, would be taken into the criminal conspiracy on some of the transactions he

directed and not others. The jury was, of course, entitled to draw this inference as well. However, we do not rest our finding of sufficiency on this alone.

For example, Hanlon arranged loans on ships which were fraudulently represented as being on time charters to Port Line/Blue Funnel and Mitsui OSK Lines. Shortly after this, he incorporated Liberian shell corporation with virtually identical names.[3] At trial, Hanlon could offer no explanation for these incorporations. The prosecutor quite properly argued to the jury that they were the groundwork for an attempt to cover up the forged nature of the charters.

Hanlon also prepared papers in which it was represented that a ship on which a loan was obtained was purchased for $5.5 million. The ship had shortly before been purchased for $3.3 million. Hanlon must have known the true price, since he had received a finder's fee of $325,000 arising out of the purchase. There was, furthermore, completely credible testimony that Hanlon knew of Bank of America's lending limitation to 75 percent of the purchase price for ship loans. As a final example, Tidal was unable to arrange a loan on the purchase of six ships since it had exceeded its loan limit at NBNA. Mark Scufalos accordingly posed as the purchaser. Hanlon prepared the documentation showing that Scufalos was the principal; the government made a credible showing that Hanlon knew he was, in fact, acting for Tidal,[4] and that NBNA would not have made the loan had it known this.[5]

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3 The names chosen were Port Line/Blue Funnel Line of London, Ltd. and Mitsui OSK Lines K.K. of Tokyo, Ltd.

4 There was evidence showing that Hanlon performed a similar service for Tidal in transactions for which he concedes the sufficiency of the government's proof.

5 Other than these transactions, Hanlon makes no challenge to the sufficiency of the evidence.

B. *Naslas.*

There was direct, credible testimony that Naslas knowingly paid bribes to the loan officers at NBNA responsible for Tidal matters. Inasmuch as the evidence clearly showed the existence of a criminal conspiracy to defraud the bank, this evidence is sufficient in itself to support a finding of knowledge on the other counts as well, as Judge Pollack charged the jury.[6] Fed. R. Evid. 404(b); McCormick on Evidence § 197(1) (2d ed. 1972); 2 Wigmore on Evidence § 321 (3d ed. 1940); *United States* v. *Ostrowsky,* 501 F.2d 318 (7th Cir. 1974); *United States* v. *Hoffman,* 415 F.2d 14, 18-19 (7th Cir.), *cert. denied,* 396 U.S. 958 (1969). Moreover, there was direct testimony that Naslas, like Hanlon, knowingly misrepresented Scufalos as the owner of Tidal's ships in order to obtain loans. There was more than sufficient evidence to convict Naslas.

C. *Katritsis.*

There was evidence that Katritsis was a confidante of Amanatides and did his "personal" typing, despite his limitation to a "hunt and peck" technique. It was reasonable for the jury to infer knowledge of Amanatides' criminal scheme from this. Moreover, there was testimony that Katritsis knowingly falsified the financial statements of Tidal, inflating its profits and asset value in order to obtain a loan. There was also testimony that Katritsis knowingly obtained the cash used by Naslas to pay bribes. Finally, there was direct testimony that Katritsis, when asked about the authenticity of a forged document, became extremely agitated. The evidence here, too, was more than sufficient.

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6 There was direct testimony that Naslas knew the purpose of these bribes was to insure the secrecy of the false representations.

II. *The Judge's Charge.*

The crucial element in this case was guilty knowledge on the part of the defendants. The appellants contend that Judge Pollack's charge on this subject, which is set out in full in the margin,[7] impermissibly invited the jury to convict upon a finding of mere negligence.

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7 The government must establish beyond a reasonable doubt that the defendant whom you are considering knew the statement or report to be false or the security overvalued. Medical science as yet has devised no instrument by which you can go back and determine what purpose was in one's mind when he performed certain acts. Rarely is direct proof available that one had knowledge of a fact or intended to bring about a result. Now and then a person may commit himself in writing or make a statement in which he concedes that as of a certain thime [sic] he had knowledge of the fact and that he acted with specific intent to achieve a specific result. But of course, that is rare, and is the exception rather than the rule.

The intent with which an act is done is often more clearly and conclusively shown by the act itself or by a series of acts than by words or explanations of the act long after its occurrence. Frequently, the acts of individuals speak their intentions more clearly than do their words.

One may apply the old adage, "Actions speak louder than words."

Accordingly, intent, willfulness and knowledge may be established by surrounding facts and circumstances as of the time acts occurred or events took place and the reasonable inferences to be drawn therefrom. This is referred to as circumstantial evidence and if believed, it is as acceptable as direct evidence.

Guilty knowledge cannot be established by demonstrating inadvertence, carelessness or other innocent reasons on the part of the defendant. This applies wherever in this charge reference is made to knowledge and willfulness. However, it is not necessary that the government prove to a certainty that a defendant whom you are considering knew any given fact or facts.

The element of knowledge of a given fact under this false statement or overvalued security charge may be satisfied by proof that a defendant acted with reckless disregard of what the truth was, unless he actually believed the contrary to be true. One may not deliberately close his eyes to what otherwise would have been obvious to him.

How does one go about determining whether a defendant knew that a given fact contained on a statement to a bank was false or that the value of certain security such as a vessel was overstated?

It is settled law that a finding of guilty knowledge may not be avoided by a showing that the defendant closed his eyes to what was going on about him; "see no evil" is not a maxim in which the criminal defendant should take any comfort. *United States* v. *Bernstein*, 533 F. 2d 775, 796-98 (2d Cir. 1976); *United States* v. *Jewel*, 532 F. 2d 697 (9th Cir. 1976) (*en banc*). *See Leary* v. *United States*, 395 U.S. 6, 46 (1969); American Law Institute Model Penal Code § 2.02(7) (Proposed Official Draft 1962). There can be no

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This is a matter which may be inferred from other facts. Thus, if an individual was involved in loans on the same vessel at two different banks and factual representations were made in connection with the second loan which were inconsistent with representations made in connection with the first loan and the representations made in connection with the second loan were established to have been false, you might infer that such an individual had knowledge of the false nature of the second representation or acted in reckless disregard of whether such representation was false.

You may infer, if you feel such an inference to be justified, that by not attempting to resolve an inconsistency of this nature, at the very least an individual had acted in reckless disregard of whether or not a given fact was false.

Similarly, you may infer from a person's involvement with a particular vessel, a particular charter or the particular transaction, that he had knowledge with relation to that vessel charter or transaction.

With respect to Costas Naslas or Paul Katritsis, the government contended they had taken part or had knowledge of certain improprieties while employed at Tidal Marine. If you find this to have been the case, when Naslas or Katritsis signed documents which contained these statements of fact you may infer, if you choose, that such misstatements either were done knowingly and deliberately or that Naslas and/or Katritsis acted with reckless disregard or reckless indifference as to whether such representations were false.

In the case of any particular situation you may ask yourselves did a defendant, because of his prior experience and his knowledge, act in reckless disregard of whether or not a given set of facts were false? If you conclude that he did, you may, if you wish, infer that he had knowledge of the false nature of such facts.

We wish to emphasize that, while we have upheld the conviction here, we urge district judges not to use the term "reckless disregard" in similar cases in the future.

doubt that the "conscious avoidance" standard set forth in Judge Pollack's charge was entirely proper.

Reading the challenged portion of the charge as a whole, *United States* v. *Gentile*, 530 F. 2d 461, 469 (2d Cir. 1976), we are satisfied that the jury was not invited to convict these defendants upon a finding of negligence. Judge Pollack was careful to distinguish "inadvertence, carelessness or other innocent reasons" from his definition of recklessness. The charge on this point contained no misstatement of law.[8] *See United States* v. *Sarantos*, 455 F. 2d 877 (2d Cir. 1972). *Cf. United States* v. *Bright*, 517 F. 2d 584, 587-88 (2d Cir. 1975).

We are troubled, however, by the repeated use of the term "reckless." This Court has previously had occasion to criticize the use of this "technical and confusing" term.

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8 Indeed, it is suggested by the government that on this record the defense may have waived its objection to the charge, inasmuch as it suggested an instruction containing the same misleading term. The appellant requested the following:

> In deciding the question of whether a defendant had actual knowledge of falsity, you may consider as a factor the circumstances that the defendant was aware of a high probability that the statements made were false, ficticious [sic] or fraudulent. You may also consider whether the defendant acted with reckless disregard of whether the statements made were false and with a conscious purpose of avoiding the truth. If you find that such was the case, you may infer from those circumstances that the defendant had the knowledge which the offenses charged require and you may convict him of the offenses charged in the Counts I have just enumerated unless you find from all the evidence that the defendant actually believed the statements made were true. In short, a defendant may not be convicted on the Counts charging false statements if he actually believed that statements referred to in these counts were true, no matter how reckless he may have acted. The fact that that belief was unreasonable or even foolish, is of no consequence if you find that it was held in good faith.

However, the charge actually used did stress the term "reckless" to a significantly greater degree, and thus the objection was not waived. Nonetheless, the fact that the appellants' highly competent and respected counsel requested the use of the term "reckless" indicates that any infringement of rights was minimal.

United States v. *Gentile, supra*, 530 F. 2d at 470; *United States* v. *Bright, supra; see United States* v. *Sarantos, supra*. The distinction between recklessness and negligence is elusive enough for even the most respected legal scholars. *See* Prosser on Torts, 32, 184-86 (4th ed. 1971). It follows that to the laymen on the jury, it might prove a significant source of confusion. It is thus preferable, in cases such as this, to omit the use of the term. It adds nothing to the "conscious avoidance" language which we have approved, and might tend to mislead the jury. We are satisfied that, in this case the challenged portion of the charge was not error, plain or otherwise. However, should trial courts continue to employ this disfavored language, we will not hesitate to take appropriate corrective measures. *Cf. United States* v. *Robinson*, slip op. 445, 451-54 (2d Cir. Nov. 10, 1976).

III. *Collateral Estoppel.*

Particularly damaging testimony was given by John Shevlin, an officer of NBNA. He testified that he was bribed by Naslas, and that both were fully aware of the nature of the transaction. Shevlin gave essentially this testimony at an earlier trial against Metzger, an alleged co-conspirator of these appellants. Metzger was acquitted by a jury on the charges of bribery. Appellants now claim that Shevlin's testimony was barred at their trial by collateral estoppel.

While collateral estoppel is a doctrine of growing importance in criminal law, *see Ashe* v. *Swenson*, 397 U.S. 436 (1970), it has no application to this case. The most expansive reading of the doctrine in this case simply indicates that the jury did not believe, beyond a reasonable doubt, that Naslas bribed Metzger. Such a finding does not in any

way preclude a finding that Naslas bribed Shevlin.[9] *See United States* v. *Musgrave*, 483 F. 2d 327, 332 (5th Cir.), *cert. denied*, 414 U.S. 1023 (1973).[10]

The appellants raise a host of other arguments, attacking the conduct of the prosecutor and several evidentiary rulings of Judge Pollack, along with a miscellaneous collection of alleged defects labelled "other error" in their brief. We have carefully considered them all, and find them to be without merit. The judgments of conviction are affirmed.

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9 In this connection, we note that corroborating evidence of bribery was presented for the first time at this trial.

10 It is possible that repeated use by the government of testimony discredited by a jury, while not raising an issue of collateral estoppel, would call for the exercise of our supervisory powers. The circumstances requiring this, however, would have to be far more aggravated than are present here, and thus we do not reach the issue.

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